No. 75-909

In the Supreme Court of the United States

OCTOBER TERM, 1975

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF ARIZONA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Circuit in *Brown* v. *Environmental Protection Agency* (App. A, *infra*, 1a-37a) and *State of Ari-*

zona v. *Environmental Protection Agency* (App. C, *infra*, 40a-44a) are reported at 521 F.2d 827 and 521 F.2d 825, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit in *Brown* v. *Environmental Protection Agency* was entered on August 15, 1975 (App. B, *infra*, 38a-39a). By order of November 3, 1975, Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to and including December 18, 1975. By order of December 8, 1975, Mr. Justice Rehnquist further extended the time within which to file a petition for a writ of certiorari to and including December 24, 1975. The judgment of the Court of Appeals for the Ninth Circuit in *State of Arizona* v. *Environmental Protection Agency* (App. D, *infra*, 45a-46a) was entered on September 8, 1975. By order of December 1, 1975, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 18, 1975, and by order of December 8, 1975, he further extended that time to and including December 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to inspect motor

vehicles to assure that they are properly maintained to control airborne pollutants within the State.

2. Whether, if the EPA Administrator has such statutory authority, the Clean Air Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions and regulations are set forth in Appendix E, *infra*, 47a-71a.

STATEMENT

A.

The Statutory Scheme

The Clean Air Act, 81 Stat. 485, as amended, 42 U.S.C. 1857 *et seq.* (the Act), requires the reduction of pollutants in the ambient air in order "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 101(b)(1).[1] In concluding that it was necessary to attain this objective, Congress found that (Section 101(a)(2))—

> the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers

[1] For the purpose of clarity, Section references to the Act will be used; cross-references to the United States Code citations appear in the Appendix.

> to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.

The Administrator of the Environmental Protection Agency (EPA) must establish standards governing maximum concentrations of particular pollutants in the air, but the Act gives state and local governments the primary responsibility for promulgating enforceable regulations to establish and implement air quality control programs (Section 101(a)(3)). The Act requires each State to submit to the Administrator plans for "implementation, maintenance, and enforcement" of the national primary and secondary standards [2] for every portion of the State within nine months after the Administrator promulgates those standards. Section 110(a)(1).

These state plans must provide a regulatory scheme for controlling emissions from stationary and

[2] National primary air quality standards are "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health." Section 109(b)(1). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator * * * is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [each] air pollutant [for which criteria have been established] in the ambient air." Section 109(b)(2). The "public welfare" includes "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Section 302(h).

moving sources of pollution to the extent necessary to attain the national standards within each of the State's air quality control regions (Section 110). The Act expressly defines the primary role of the States, through the mechanism of the implementation plan, in assuring the attainment of the air quality standard (Section 107(a)):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

The required elements of a state implementation plan are set forth in Section 110(a)(2)(A)-(H) of the Act and include: (1) regulations limiting emissions from old and new pollution sources; (2) schedules for compliance with the limitations; (3) provisions for collecting, analyzing and making available emissions data; (4) provisions for such additional methods of pollution control as may be necessary, including land-use and transportation controls; [3] (5) a description of the State's legal authority and resources to implement its plan; (6) a procedure for revision

[3] A transportation control measure is "any measure, such as reducing vehicle use, changing traffic flow patterns, decreasing emissions from individual motor vehicles, or altering existing modal split patterns [patterns of use of various transportation methods] that is directed toward reducing emissions of air pollutants from transportation sources." 40 C.F.R. 51.1(r). See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

of its plan; (7) provisions for intergovernmental cooperation; and (8) a procedure for inspection and testing of motor vehicles.

On April 30, 1971, the Administrator, acting pursuant to Section 109 of the Act, promulgated national primary and secondary air quality standards for six pollutants. 36 Fed. Reg. 8186. Four of these pollutants—carbon monoxide, photochemical oxidants, nitrogen dioxides and hydrocarbons—result chiefly from motor vehicle emissions, which constitute forty-eight percent of the total of approximately 190 million tons of air pollutants produced in this country annually.[4]

Each State was required to submit its implementation plan to the Administrator for approval no later than January 30, 1972, and he was to act on all plans by May 31, 1972 (Section 110(a)).[5] If the plan

[4] Motor vehicles emit carbon monoxide (CO) directly into the air. Emitted hydrocarbons, however, combine with oxides of nitrogen (NOx) in the presence of sunlight to produce the secondary pollutant, photochemical oxidants (Smog). See Department of Health, Education and Welfare, Nos. AP-63 and AP-64, "Air Quality Criteria for Photochemical Oxidants" and "Air Quality Criteria for Hydrocarbons" (1970); S. Rep. No. 91-1196, 91st Cong., 2d Sess. 25-28 (1970); H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 6, 11-13 (1970); Committee Print, Serial No. 93-18, A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess. (Jan. 1974) ("Leg. Hist."), pp. 381-382 (S. Debate on S. 4358, Sept. 22, 1970, Sen. Montoya); Leg. Hist. 228 (S. Debate on S. 4358, Sept. 21, 1970, Sen Muskie).

[5] On August 14, 1971, the Administrator announced that although transportation controls were required as part of a state plan, a lack of experience and available data made deferral of such controls necessary. Thus submission by the States of separate transportation control plans was deferred until February 15, 1973. 36 Fed. Reg. 15486.

submitted was inadequate to meet the primary ambient air quality standards, the Administrator was required to develop and promulgate an appropriate plan for the State (Section 110(c).[6]

Section 113 of the Act sets forth the manner in which EPA is to enforce the Act's provisions. It provides in part that whenever the Administrator finds that "any person is in violation of any requirement of an applicable implementation plan,"[7] he shall notify the person and the State involved of his finding (Section 113(a)(1)). If the violation is not corrected

[6] Section 110(c)(1) provides in pertinent part:

> The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> * * * * *
>
> (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, * * *
>
> * * * * *
>
> * * * The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

[7] Section 302(e) defines "person":

> The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

An "applicable implementation plan" includes an implementation plan promulgated by the Administrator under Section 110 (Section 110(d)).

within 30 days, the Administrator "may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action" in the appropriate district court (*ibid.*).[8] In the civil action the court may issue a permanent or temporary injunction against "any person" who violates or fails or refuses to comply with an order or any requirement of an applicable implementation plan (Section 113(b)).[9]

B.

The California and Arizona Transportation Control Plans

1. *California.* On February 21, 1972, the State of California submitted its implementation plan for achieving and maintaining the national ambient air quality standards. 37 Fed. Reg. 10851. As permitted by the Administrator (*supra*, note 5), the plan did not contain transportation control measures. The Administrator found the plan inadequate in several respects (37 Fed. Reg. 10842; 38 Fed. Reg. 2194). While development of a revised plan was being negotiated, the United States Court of Appeals for the District of Columbia Circuit held that the Administrator had improperly permitted postponement of

[8] The order does not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the violation (Section 113(a)(4)).

[9] The Act also provides for "Federally assumed enforcement" of an "applicable implementation plan" whose requirements are being implemented by the State ineffectively (Section 113(a)(2)).

submission of the transportation control portions of state implementation plans beyond the statutory deadline of January 30, 1972. *Natural Resources Defense Council* v. *Environmental Protection Agency*, 475 F.2d 968. The court ordered the Administrator to rescind all previously granted extensions for the submission and implementation of transportation control measures and to require the States to submit appropriate measures by April 15, 1973. The court directed the Administrator to prepare and publish a plan as required by the Act if a State failed to submit such measures. 475 F.2d at 970-971.

On March 20, 1973, the Administrator notified the States of the requirement to submit transportation control measures. 38 Fed. Reg. 7323. The State of California failed to submit adequate measures; accordingly, on June 22, 1973, the Administrator disapproved the measures submitted, and promulgated a substitute transportation control plan for the State of California on November 12, 1973 (38 Fed. Reg. 31232 *et seq.*)[10]

The Administrator's plan included specific requirements applicable to the various California air quality control regions and general requirements applicable throughout the State.[11] One basic requirement

[10] The Administrator granted the State a two-year extension of time to meet the primary standards for photochemical oxidants and carbon monoxide under Section 110(e) of the Act.

[11] These requirements are summarized in the opinion below (App. A, *infra*, 10a-11a); some of them have subsequently been revoked or suspended (App. A, *infra*, 12a).

was that the State "establish an inspection and maintenance program applicable to all light-duty vehicles" operating on state-owned streets and highways (40 C.F.R. 52.242, App. E, *infra*, 70a). The State was required to submit "a detailed compliance schedule showing the steps it will take to establish and enforce" the inspection and maintenance program, including the text of needed statutory proposals or regulations, and a "signed statement from the Governor" identifying the sources and amount of funds for the program (*id.* at 70a-71a).

The State of California did not timely submit an inspection and maintenance program, as required by the EPA plan, and on April 14, 1975, EPA sent the State of California a notice of violation pursuant to Section 113(a)(1) of the Act. The notice cited the State's failure "to submit the compliance schedule or the adopted regulations establishing the inspection and maintenance program" pursuant to the EPA-promulgated implementation plan (App. A, *infra*, 7a). The legislature of California has authorized the Governor to implement a mandatory inspection and maintenance program in the Los Angeles air quality control region, and later to expand the program to other parts of the State. Ann. Cal. Code, Bus. & Prof., Sec. 9889.50 *et seq.* (1973).

2. *Arizona.* The implementation plan submitted by Arizona on January 28, 1972, also omitted transportation control plans. On April 13, 1973, following the decision in *Natural Resources Defense Council*, v. *Environmental Protection Agency, supra*, the State

submitted its transportation control plan. 38 Fed. Reg. 10119. The Administrator concluded that this plan contained an acceptable program for the inspection and maintenance of motor vehicles (38 Fed. Reg. 33369), but he added three provisions to assure compliance with the Act: (1) a management-of-parking-supply regulation, (2) an employee carpool incentive program, and (3) a bus/carpool lane program (40 C.F.R. 52.137-52.139).[12] These provisions required the State to submit schedules showing how it planned to meet the required deadlines for implementing the programs. No such schedules were submitted; instead, the State petitioned the court of appeals for review of the Administrator's action pursuant to Section 307(b)(1) of the Act, 42 U.S.C. 1857h-5(b)(1).

C.

The Decisions Below

1. *Edmund G. Brown, Jr., et al.* v. *Environmental Protection Agency.* Petitions to review the California implementation plan promulgated by EPA were timely filed in the court of appeals by approximately 208 parties pursuant to Section 307(b)(1) of the Act, 42 U.S.C. 1857h-5(b)(1). After preliminary proceedings, the court and the parties determined that the question of the scope of EPA's authority to require compliance by the State was ripe for immediate ad-

[12] EPA subsequently suspended the management-of-parking-supply regulation (40 Fed. Reg. 28064, 29713).

judication. Other constitutional and statutory questions were to be heard at a later date.

The court concluded that the Clean Air Act does not authorize the "imposition of sanctions on a state or its officials for failure to comply with the Administrator's regulations which direct the state to regulate the pollution-creating activities of those other than itself * * *" (App. A, *infra*, 9a). The court reached this conclusion on the basis of Section 113, which it read as distinguishing between "persons" (against whom sanctions for non-compliance with implementation plans could be enforced) and States (App. A, *infra*, 17a-23a); in light of court's view of the structure of the Act; and because "Congress would not have intended to take such a step in the light of the delicacy with which federal-state relations always have been treated by all branches of the Federal government in this obscure manner" (App. A, *infra*, 16a). The court recognized that "our reading of section 113 and our perception of the structure of the Act is not unambiguously supported by the applicable legislative history" (App. A, *infra*, 19a).

Although resting its decision on statutory interpretation, the court discussed the constitutional issues that would be raised by a contrary interpretation. Economic activity by the States that substantially affects interstate commerce is subject to federal regulation under the Commerce Clause, but no case, according to the court of appeals, "holds or even suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or 'species of commercial intercourse' subject to regulation by Congress" (App. A, *infra*, 27a). Thus, the federal government cannot force a State to regulate air pollution caused by others. Otherwise, the court suggested, States might be deprived of control over the manner in which their tax revenues are spent and might become simply tools for effectuating federally-prescribed policies (App. A, *infra*, 32a-37a).

2. *State of Arizona* v. *Environmental Protection Agency*. Petitions for review of EPA's revisions of the Arizona Transportation Control Plan were timely filed by six parties, including the State of Arizona. On September 8, relying on its decision in *Brown* v. *Environmental Protection Agency*, *supra*, the court of appeals held that "the Clean Air Act does not authorize the imposition of sanctions against the State of Arizona or its officials for failure to comply with" the EPA amendments to the state implementation plan (App. C, *infra*, 43a).

3. Shortly after the Ninth Circuit decided *Brown* and *Arizona*, the Fourth Circuit faced the issues presented in these cases in *Maryland* v. *Environmental Protection Agency*, No. 74-1007, decided September 19, 1975.[13] Although focusing on Section 110 of the Act, rather than Section 113, the court reached a con-

[13] The Third Circuit had previously held, in *Pennsylvania* v. *Environmental Protection Agency*, 500 F.2d 246, that the Clean Air Act gives the Administrator the authority to compel state compliance with federally-promulgated implementation plans and that the Act is constitutional.

clusion similar to that of the Ninth Circuit. In order to avoid serious constitutional questions, it held that "the EPA was without authority under the statute, as a matter of statutory construction, to require Maryland to establish [transportation control] programs and furnish legal authority for the administration thereof" (slip op. at 41-42).

In *District of Columbia* v. *Train*, 521 F.2d 971, the most recent case to consider these issues, the Court of Appeals for the District of Columbia Circuit took a somewhat different approach. It held that the Administrator has no authority under the Act to require the States to adopt legislation or regulations to establish a transportation control program found necessary by EPA. Thus, if a State fails to submit an acceptable plan, the Administrator must promulgate the regulations to be applied within the State; he cannot compel the State to do so (521 F.2d at 983-986). But, the court held, once such regulations have been promulgated, the Act authorizes the Administrator to require the States to enforce them. The court then faced the constitutional issue avoided by the Ninth and Fourth Circuits and concluded that a State could be required to enforce federal regulations designed to control pollution the State caused directly (*e.g.*, through operation of state owned vehicles) or indirectly (*e.g.*, through allowing use of state roads by vehicles not conforming to federal requirements). But although the federal power extended to requiring the States to prohibit the use of state roads by vehicles that do not comply with

federal standards, it could not constitutionally extend to requiring the State to inspect privately operated vehicles to assure that they are properly equipped and maintained (521 F.2d at 992-994).

REASONS FOR GRANTING THE WRIT

The EPA Administrator's authority to promulgate transportation control plans to be enforced by the States is of basic importance to the effectiveness of the Clean Air Act. The courts of appeals that have considered the extent of that authority have reached widely varying and inconsistent conclusions on both statutory and constitutional grounds. Review by this Court can end the uncertainty and confusion that have resulted.[14] Moreover, the constitutional principles involved here are fundamental to the federal system, and the final resolution of the conflict among the circuits may substantially determine what legislative alternatives are available to Congress in the future.

If the Clean Air Act does not permit the Administrator to promulgate effective plans to control the emission of pollutants by motor vehicles after the States have failed to do so and to require the States to implement and enforce them, then, as a practical matter, the Act may be as ineffectual as previous efforts to persuade the States to improve air quality (See *Train* v. *Natural Resources Defense Council*,

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[14] The Solicitor General has authorized the filing of petitions for writs of certiorari in *Maryland* v. *Environmental Protection Agency, supra*, and *District of Columbia* v. *Train, supra*.

421 U.S. 60, 63-65). This will mean that air pollution associated with our existing transportation systems will remain substantially uncontrolled since comprehensive pollution control programs governing motor vehicles in use are financially and administratively beyond the capability of EPA.

Alternatively, if the Act does provide for federal supervision of state transportation control systems, but the means Congress chose to provide that supervision are unconstitutional, this would not only provoke congressional reconsideration of the Act; it would also indicate that other state administered, federally supervised programs not tied to grants-in-aid are of dubious constitutionality, and that the statutory scheme utilized here must be avoided in future legislation.

As matters now stand, the Administrator faces a dilemma from the conflicting decisions concerning his obligations under the Act. In the Third Circuit, he has the duty to promulgate, when necessary, substitute transportation control plans, including inspection and maintenance programs, requiring the States to adopt and enforce pollution control measures (*Pennsylvania* v. *Environmental Protection Agency*, 500 F.2d 246). In the Ninth and Fourth Circuits, he must himself adopt and enforce the necessary measures (*Brown* v. *Environmental Protection Agency*, *supra*, and *Maryland* v. *Environmental Protection Agency*, *supra*). In the District of Columbia Circuit, he must adopt a detailed substitute state inspection and maintenance program, but may require the States to enforce it in part. (*District of Columbia* v. *Train*, *supra*).

The difficulty of the Administrator's position is highlighted by the fact that the plan at issue in *District of Columbia* v. *Train* includes the entire national capital area. Thus, the Administrator has been instructed by one court of appeals that the Act requires him to develop regulations for enforcement by the States of Maryland and Virginia in the Washington suburban area, while he has been told by another court of appeals with jurisdiction over Maryland and Virginia that he has no authority to require the States to enforce such plans (*Maryland* v. *Environmental Protection Agency*, *supra*). Only this Court can resolve this dilemma.

As to the merits, we believe the court below erred in its interpretation of the Act, misreading the Act's provisions to avoid facing admittedly difficult constitutional issues. The Act contemplates that if a State fails to promulgate an appropriate implementation plan, the Administrator must himself do so.[15] But once substitute measures have been promulgated to control motor vehicle emissions, the State can be compelled to implement them, although this may re-

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[15] EPA does not challenge in this Court the decision of the Court of Appeals for the District of Columbia Circuit that, in the absence of a satisfactory state plan, the Administrator must promulgate a comprehensive substitute plan, and cannot simply direct the State to pass legislation or regulations establishing programs that comply with the Act.

quire appropriation of state funds or even enactment of complementary state legislation.[16]

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[16] The Administrator has described his interpretation of the scope of his authority as follows (38 Fed. Reg. 30626, 30632 (Nov. 6, 1973):

> Many of the measures promulgated herein include requirements that Federal, State or local units of government take specified actions to control air pollution from transportation systems. The Clean Air Act and its legislative history demonstrate that this was the intent of Congress. The approach of leaving primary responsibility for implementation at the State and local level is also made necessary by the nature of air pollution generated by millions of individual vehicles operating on an extensive network of public roads owned and administered by State and local governments.
>
> The specific requirements imposed herein upon States and localities are based largely on two conclusions in addition to the factors discussed above: (1) that the governmental units must abide by valid implementation plan requirements just as much as any other source owners, and (2) that they are the owners and operators of pollution sources through their ownership and operation of highway transportation facilities.
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> * * * * *
>
> Transportation is a necessary service. In our society, the form in which it is provided depends overwhelmingly on the regulatory, taxing, and investment decisions made at all levels of government. By building and maintaining roads and highways, by licensing vehicles and operators, by providing a system of traffic laws, and in many other ways, government has encouraged the growth of automobile use to its present levels. There is nothing inevitable about such a choice. Governments could equally well have chosen to discharge their basic function of maintaining a transportation system in ways that would have discouraged the use of single-passenger automobiles, and encouraged the use of mass transit. But often they have not.

While we recognize that this interpretation of the Act raises significant constitutional questions, we do not believe that they can legitimately be avoided. Congress acted on the firm belief that when analyzed in the light of this Court's decisions and the precise scope of the authority granted by the Act, the Constitution permits the allocation of responsibilities Congress has enacted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1975.

APPENDIX A

(CORRECTED OPINION)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-3306

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 73-3305

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY & COLLEGES, ETC., PETITIONER,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 73-3307

CALIFORNIA AIR RESOURCES BOARD, ET AL., PETITIONERS,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

On Petition to Review Actions of the Administrator of the Environmental Protection Agency

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OPINION
[August 15, 1975]

Before: WRIGHT, KILKENNY and SNEED, Circuit Judges.

SNEED, Circuit Judge:

This is a proceeding growing out of numerous petitions for review of certain regulations of the Environmental Protection Agency. Petitioners included the Governor of the State of California, Trustees of the California State University and Colleges, the California Air Resources Board, numerous California cities and counties, private business concerns, and others. Certain of these petitioners filed consolidated briefs in which certain constitutional questions were raised. In due course, the Agency moved to expedite the hearing with respect to these constitutional issues. This motion was granted. Those petitioners seeking to present constitutional issues thereafter were directed to appear at a prehearing conference pursuant to Rule 33, FED. R. APP. P., at which the issues sought to be raised were identified and the time to be allowed for oral argument was fixed. At this prehearing conference, the petitioners were informed that this Court contemplated entering a judgment regarding the constitutional issues pursuant to Rule 54(b), FED. R. CIV. P., prior to a hearing on, or disposition of, such other issues as were raised by

the petitioners. Oral argument on the constitutional issues has been heard and our disposition of them is set forth herein. Our jurisdiction to hear these petitions is based on Section 307(b) of the Clean Air Act.[1]

I.

The Background of This Proceeding

The controversy between the petitioners and the Administrator has its roots in the Clean Air Amendments of 1970.[2] Under these Amendments, California was required to submit for the approval of the Administrator a state plan providing for the implementation, maintenance, and enforcement of national ambient air quality standards,[3] including, if necessary, land-use and transportation controls.[4] California complied by submitting its plan on February 21,

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[1] 42 U.S.C.A. § 1857h-5(b) (West Supp. 1975). In view of the issuance of a "Notice of Violation" by EPA to the State, which is the initial step in applying sanctions for noncompliance with EPA regulations, and in view of the interrelationship between the enforcement procedures and the substantive regulations contained in the EPA's implementation plan, the constitutional challenges here made are clearly ripe for adjudication. *See* Pennsylvania v. Environmental Protection Agency, 500 F.2d 246, 256 n.17 (3d Cir. 1974); and text pp. 6-7.

[2] Act of Dec. 31, 1970, P.L. 91-604, 84 Stat. 1676, *amending* 42 U.S.C. § 1857 *et seq.* (Supp. V, 1969).

[3] Clean Air Act § 110(a), 42 U.S.C.A. § 1857c-5(a) (West Supp. 1975).

[4] Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (West Supp. 1975).

1972.[5] The Administrator approved this plan in part and disapproved it in part on May 31, 1972.[6] Following a further revision by California and partial approval by the Administrator, there were promulgated rules by the Administrator on September 22, 1972, applicable to certain aspects of air pollution control.[7] These rules, however, did not purport to control photochemical oxidants.

This omission led to *City of Riverside* v. *Ruckelshaus* 4 E.R.C. 1728 (C.D. Cal. 1972), a suit in the District Court for the Central District of California, in which the Administrator was ordered to promulgate regulations to control photochemical oxidants, including all necessary transportation controls and land-use controls, not later than January 15, 1973. The Administrator thereafter issued such regulations but, pursuant to discretion recognized by the court in *City of Riverside*, extended the time within which the national primary standard for photochemical oxidants in California could be attained for two years.[8]

Such extensions were held impermissible under the terms of the Clean Air Act in *National Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F.2d 968 (D.C. Cir. 1973). The court directed the Administrator to inform the states which had not submitted an implementation plan enabling

[5] 37 Fed. Reg. 10851 (1972).

[6] 37 Fed. Reg. 10852 (1972).

[7] 37 Fed. Reg. 19812-15, 19829-35 (1972).

[8] 38 Fed. Reg. 2194, 10851 (1973).

them to meet the primary standard by May 31, 1975 to submit such plans, including but not limited to land-use and transportation controls, not later than April 15, 1973. California failed to submit the required plan and the Administrator disapproved its previous plan because it did not provide for attainment and maintenance of the national standards for photochemical oxidants.[9] Thereafter, the Administrator promulgated a transportation control plan for California[10] which, together with the regulations promulgated pursuant to the mandate of the court in *City of Riverside*, *supra*, covered all of California's Air Quality Control Regions.

After concluding that attainment of the required ambient air quality standard for photochemical oxidants and carbon monoxide must be deferred until 1977 because the necessary technology or other alternatives are not available,[11] the Administrator's plan contemplated among other things, the reduction of gasoline sold within the Los Angeles, San Francisco, Sacramento Valley, San Joaquin Valley and San Diego Regions; the operation by the State of California of an inspection and maintenance program designed to reduce emissions from automobiles; limitations to be imposed by the State on the use of motorcycles; the institution by the State of an oxidizing catalyst retrofit program; control of dry cleaning

[9] 38 Fed. Reg. 16550, 16556, 16564 (1973).

[10] 38 Fed. Reg. 31232, *as corrected*, 38 Fed. Reg. 34124, 35467 (1973); 39 Fed. Reg. 1025, 1848 (1974).

[11] *See* Clean Air Act § 110(e)(1)(A), 42 U.S.C. § 1857c-5(e)(1)(A) (1970).

solvent vapor losses; the imposition of surcharges on parking spaces; the development of a procedure of review and approval of construction or modification of parking facilities; the establishment by the State of a computer-aided carpool matching system; and the fixing by the State of certain preferential bus and carpool lanes.[12] This plan specifically directed the State of California to undertake those tasks assigned to it, to report its compliance to the Agency, and, in the case of the inspection and maintenance program, to report the date by which the State would recommend any needed legislation and to submit "[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds for the program" and the "text of needed legislation" if existing legislation does not authorize the funds which the program will require.[13] Other miscellaneous duties were imposed upon the State.[14] The Agency has made clear that it believes it has the legal authority to bring civil actions or seek penalties against the states which fail to comply with its regulations.[15]

At least 208 parties petitioned this Court for a review of these actions within the 30-day period

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[12] 38 Fed. Reg. 31232-55 (1973). The Agency's requirements are codified at 40 C.F.R. §§ 52.220-52.266 (1974).

[13] 40 C.F.R. § 52.242(f). For similar requirements, *see, e.g.*, 40 C.F.R. §§ 52.243(f), 52.244(f), 52.257(c), 52.258(f), 52.259(g) (1974).

[14] *E.g.*, 40 C.F.R. § 52.262 (1974) (status report on "corridor issues").

[15] 38 Fed. Reg. 30632-33 (1973).

allowed by the Clean Air Act.[16] Many of these have been dismissed, but a large number are currently pending. In addition to certain revisions, the Administrator has suspended indefinitely the regulations pertaining to management of parking supply[17] and has withdrawn all parking surcharge regulations.[18] The indefinite suspension of the parking management regulations has enabled us to dismiss without prejudice a number of petitions which were directed to the validity of these regulations.[19]

Nonetheless, the Administrator insists that the remainder of its regulations constitute a valid exercise of its authority and that its directions to the State of California contained therein must be obeyed. In keeping with this view, the Administrator on April 11, 1975, dispatched to California a "Notice of Violation" pursuant to Section 113(a)(1) of the Clean Air Act[20] for failure "to submit the compliance schedule or the adopted regulations establishing the inspection and maintenance program" required by the Administrator's regulations.

The Administrator, however, suggests that a deter-

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[16] Clean Air Act § 307(b), 42 U.S.C.A. 1857h-5(b) (West Supp. 1975). The figure 208 is acknowledged by the Agency in its brief.

[17] 40 Fed. Reg. 29713 (1975).

[18] 39 Fed. Reg. 1848 (1974).

[19] California Business Properties Ass'n v. United States Environmental Protection Agency, No. 73-3268 (9th Cir., ..., 1975).

[20] 42 U.S.C. § 1857c-8(a)(1) (1970).

mination regarding its authority under the Clean Air Act and the Constitution is not ripe at the present time because it has not instituted as yet the procedures necessary to invoke sanctions against the State of California. The sanctions include, the Administrator insists, injunctive relief,[21] imposing a receivership on certain state functions,[22] holding a state official in civil contempt with a substantial daily fine until compliance is secured,[23] and requiring a state to allocate funds from one portion of its budget to another in order to finance the undertakings required by the Agency.[24] The Agency disclaims any authority to seek criminal penalties against state legislators.[25] It also indicates that in the final analysis the fashioning of sanctions is within the discretion of the appropriate court. We do not believe any doctrine of ripeness or exhaustion of administrative remedies should preclude our determination of the issues raised in this proceeding by the State of California and others regarding the authority to impose the regulations with respect to which these petitions for review were filed.

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[21] Clean Air Act § 113(b), 42 U.S.C. 1857c-8(b) (Supp. III, 1973).

[22] *Cf.* Turner v. Goolsby, 255 F. Supp. 724, 730, 733-34 (S.D. Ga. 1966).

[23] Harvest v. Board of Public Instruction, 312 F. Supp. 269, 278 (M.D. Fla. 1970).

[24] Wyatt v. Stickney, 344 F. Supp. 373, 377-78 (M.D. Ala. 1972), *aff'd*, Wyatt v. Aderholt, 503 F.2d 1305, 1316 (5th Cir. 1974).

[25] *Cf.* Gravel v. United States, 408 U.S. 606, 616 (1971).

Such issues must be determined in this proceeding for it is unlikely they could be raised "in a civil or criminal proceeding for enforcement."[26] Moreover, the orderly administration of the Clean Air Act requires that the serious questions to which the parties have addressed themselves be resolved as expeditiously as possible.

The position of the State of California and the other petitioners in this proceeding is simply that the Clean Air Act does not authorize the Administrator to impose sanctions on the state or its officials for failure to comply with the regulations here being reviewed, and that any such attempt based on the Commerce Power would be unconstitutional. While we do not feel it necessary to embrace fully California's position, we do believe that the meaning of the Clean Air Act, insofar as the impositions of sanctions is concerned, is sufficiently ambiguous to permit us to interpret it in a fashion that avoids the constitutional issues. Accordingly, we hold that the Clean Air Act does not authorize the imposition of sanctions on a state or its officials for failure to comply with the Administrator's regulations which direct the state to regulate the pollution-creating activities of those other than itself, its instrumentalities and subdivisions, and the municipalities within its borders. Specifically, we hold that the Clean Air Act does not authorize the imposition of sanctions for any failure of the State of California to comply with the direc-

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[26] *See* Clean Air Act § 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970), and note 1 *supra*.

tions contained in 40 C.F.R. § 52.22(a) (growth plans for maintenance of national standards); 40 C.F.R. § 52.242 (inspection and maintenance program); 40 C.F.R. § 52.243 (motorcycle limitation); 40 C.F.R. § 52.244 (oxidizing catalyst retrofit); 40 C.F.R. § 52.245 (control of oxides of nitrogen, hydrocarbon, and carbon monoxide emissions from in-use vehicles); 40 C.F.R. § 52.257 (computer car-pooling matching); 40 C.F.R. § 52.258 (mass transit priority-exclusive bus use); 40 C.F.R. § 52.259 (ramp metering and preferential bus/carpool lanes); 40 C.F.R. § 52.261 (preferential bus/carpool lanes, San Francisco Bay Area); 40 C.F.R. § 52.263 (priority treatment for buses and carpools, Los Angeles Region); 40 C.F.R. § 52.264 (mass transit priority strategy and planning); 40 C.F.R. § 52.265 (mass transit and transit priority planning); and 40 C.F.R. § 52.266 (mass transit and transit priority planning). It follows that we consider 40 C.F.R. § 52.23 (violations and enforcement) invalid to the extent it is contrary to this holding.

Our holding recognizes that the pollution-creating activities of the State of California, its instrumentalities and subdivisions, and its municipalities, are subject to valid regulations promulgated by the Administrator. We also recognize that the State must avoid impeding any enforcement of valid regulations which the Administrator undertakes. We reject, however, the view that the Clean Air Act authorizes the imposition of sanctions against the State for its failure to administer and enforce a system of regulations

promulgated by the Administrator which are designed to control the pollution-creating activities of the citizens of the State and others subject to its jurisdiction. Tersely put, the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs.

In support of this proposition, we shall examine those portions of the Clean Air Act upon which the Administrator relies and demonstrate that the Act does not unambiguously vest him with the powers he here asserts. Thereafter, we shall examine the constitutional difficulties which the Administrator's view encounters and which induce us to reject his interpretation of his powers.[27]

II

Interpretation of the Act

The Clean Air Act as amended[28] is both lengthy

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[27] To support his interpretation, the Administrator relies upon Weinberger v. Bentex Pharmaceutical, Inc., 412 U.S. 645, 653 (1973); Udall v. Tallman, 380 U.S. 1 (1965); Mitchell v. DeMario Jewelry, 361 U.S. 288, 291-92 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936); South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir. 1974); Pennsylvania v. Environmental Protection Agency, 500 F.2d 246, 263 (3d Cir. 1974); Powell v. Katzenbach, 359 F.2d 221, 235 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); 5 B.N.A. "Environmental Reporter—Current Developments" 755 (Sept. 20, 1974); and cases cited notes 22-25 *supra*.

[28] 42 U.S.C.A. § 1857 *et seq.* (West Supp. 1975) (Chap. 15B-Air Pollution Control).

and complex. It is divided into four subchapters designated "Air Pollution Prevention and Control," "Motor Vehicle Emission Standards," "General Provisions," and "Noise Pollution." As already indicated, the controversy between the Administrator and the State of California before us grows out of section 110(c)(1) of the Act,[29] which empowers the Administrator to promulgate an implementation plan if the plan submitted by a state is not "in accordance with the requirements of this section." [30] The Administrator contends that having promulgated such a plan the Act empowers him to impose sanctions on the State, or at least on the administrative officials of the State, should it or they fail to administer and enforce the plan. It is clear that the Administrator's regulation, 40 C.F.R. § 52.23, so provides.[31]

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[29] 42 U.S.C.A. § 1857c-5 (West Supp. 1975).

[30] Clean Air Act § 110(c)(1)(B), 42 U.S.C.A. § 1857c-5 (c)(1)(B) (West Supp. 1975).

[31] 40 C.F.R. § 52.23 (1974) provides:

> Failure to comply with any provisions of this part shall render the person or Governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under Section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule. [38 Fed. Reg. 30633 (1973).]

The statutory authority for this regulation is by no means apparent. The most likely place in the Act for such authority to be found would seem to be section 113 of the Clean Air Act,[32] which deals with "Federal enforcement procedures." More particularly, this authority should appear in subsection (a)(2) which deals with the situation in which violations of implementation plans "appear to result from a failure of the state in which the plan applies to enforce the plan effectively." [33] It does not unambiguously so appear. The subsection first provides that if the "Administrator finds such failure extends beyond the 30th day after such notice, he shall give public

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[32] 42 U.S.C.A. § 1857c-8 (West Supp. 1975).

[33] Clean Air Act § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2) (1970) provides:

> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—
>
> (A) by issuing an order to comply with such requirement, or
>
> (B) by bringing a civil action under subsection (b) of this section.

notice of such finding." Thereafter, it provides that during the period of the state's recalcitrance or neglect, "the Administrator may enforce any requirement of such plan with respect to any person (A) by issuing an order to comply with such requirement, or (B) by bringing a civil action under subsection (b) of this section." The Administrator contends that, inasmuch as the term "person" is defined in subsection 302(e)[34] to include a state, municipality, or political subdivision, subsection 113(a)(2) authorizes a civil action against a recalcitrant state. Moreover, he contends that subsections (b)[35] and

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[34] 42 U.S.C. § 1857h(e) (1970).

[35] Clean Air Act § 113(b), 42 U.S.C.A. § 1857c-8(b) (West Supp. 1975) provides:

> (b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—
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> (1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or
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> (2) violates any requirements of an applicable implementation plan (a) during any period of Federally assumed enforcement, or (b) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or
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> (3) violates section 1857c-6(e), 1857c-7(c), or 1857c-10(g) of this title; or
>
> (4) fails or refuses to comply with any requirement of section 1857c-9 of this title.
>
> Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compilance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)[36] of section 113 which impose sanctions also are applicable to states because of their use of the term "person."

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[36] Clean Air Act § 113(c), 42 U.S.C.A. § 1857c-8(c) (West Supp. 1975) provides:

> (c)(1) Any person who knowingly—
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> (A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or
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> (B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, or
>
> (C) violates section 1857c-6(e), section 1857c-7(c), or section 1857c-10(g) of this title shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.
>
> (2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

We disagree. While we are not prepared to say that under no circumstances should the term "person" be read to include a state when used in connection with a sanction-imposing provision of the Act, we are convinced that section 113(a)(2) is designed to provide the Administrator with power to enforce against polluters provisions of an implementation plan not being enforced by the state. Moreover, we are not convinced that the section is designed to equip the Administrator with power to sanction the non-enforcing state.

Our lack of conviction on this point primarily is grounded in our belief that Congress would not have intended to take such a step in the light of the delicacy with which federal-state relations always have been treated by all branches of the Federal government in this obscure manner. In addition, we should be reluctant to interpret expansively a provision such as subsection 113(a)(2) when by doing so we encounter fundamental constitutional questions. We also find comfort in the fact that in subsection 113(a)(1), as well as within subsection 113(a)(2),[37] the

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[37] Clean Air Act § 113(a)(1), 42 U.S.C. § 1857c-8(a)(1) (1970) provides:

> (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring

term "State" is employed in a manner that distinguishes it from the term "person." That is, in subsection 113(a)(1) the Administrator must notify both the "person" in violation of a plan and the "State" in which the plan being violated applies. In subsection 113(a)(2) when a "State" fails to enforce the plan effectively, the Administrator may enforce it against "any person." Had Congress intended the term "person" in that context to include the "State," the natural language to have employed would have been as follows:

> During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereinafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person [, including the State so failing to enforce the plan effectively]—

The language in brackets is missing from the text of section 113(a)(2) and we decline to read it in by way of the statutory definition of the term "person." The Administrator had no difficulty in making clear his intention to impose sanctions on states not enforcing effectively implementation plans.[38] Congress can be expected to have no less capacity for clarity.

As we see it, subsections 113(a)(1) and (a)(2)

> such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

[38] *See* note 31 *supra*.

are designed to vest the Administrator with power to enforce a state implementation plan should the state fail to do so. This parallels the Administrator's power to promulgate an implementation plan for a state which fails to prepare a suitable plan.[39] A diligent search of the sections of the Clean Air Act fails to reveal a single instance in which Congress explicitly has vested in the Administrator power to compel the states to administer and enforce regulations promulgated by him designed to govern polluters, potential or actual, other than the state, municipality, or political subdivision of the state. Counsel for the Administrator also have been unable to guide us to such a provision. This strengthens our belief that the function of subsections 113(a)(1) and (a)(2) is as we perceive it to be.

Viewed generally, the structure of the Clean Air Act reflects a genuine effort to develop an elaborate form of cooperative federalism in which both the Federal government and the states are assigned vital roles. Techniques such as preemption, total and partial,[40] delegations to the states of federal authority,[41]

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[39] Clean Air Act § 110(c)(1), 42 U.S.C.A. § 1857c-5(c)(1) (West Supp. 1975).

[40] Clean Air Act § 119(f), 42 U.S.C.A. § 1857c-10(f) (West Supp. 1975) (unavailable fuels use requirements); Clean Air Act § 209(a), 42 U.S.C. § 1857f-6a(a) (1970) (new motor vehicle emission standards); Clean Air Act § 211(c)(4)(A), 42 U.S.C. § 1857f-6c(c)(4)(A) (1970) (fuel use controls); Clean Air Act § 233, 42 U.S.C. § 1857f-11 (1970) (aircraft emission standards).

[41] *E.g.*, Clean Air Act § 107(a), 42 U.S.C. § 1857c-2(a) (1970) (responsibility for assuring air quality); Clean Air

and the creation of opportunities for states to participate in the task of controlling air pollution[42] are employed. We find this complex structure incompatible with the view that buried within section 113 is the Congressional intent to make the states departments of the Environmental Protection Agency no less obligated to obey its Administrator's command than are its subordinate officials.

We readily acknowledge that our reading of section 113 and our perception of the structure of the Act is not unambiguously supported by the applicable legislative history. On the other hand, we have found nothing that marks our interpretation as plainly erroneous. An important example of the ambiguity that characterizes the relevant history is the following colloquy between Senator Eagleton of Missouri and Senator Muskie of Maine following the presentation by Senator Muskie of the Conference Report on the Clean Air Amendments of 1970. Senator Eagleton, in commenting on "the significance and the parameters of this noteworthy piece of legislation," said,

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Act § 111(c), 42 U.S.C. § 1857c-6(a) (1970) (power to implement and enforce standards of performance); Clean Air Act § 112(d), 42 U.S.C. § 1857c-7(d) (1970) (power to implement and enforce emission standards for hazardous air pollutants); Clean Air Act § 211(c)(4)(B)-(C), 42 U.S.C. § 1857f-6c(c)(4)(B)-(C) (1970) (power to prescribe and enforce vehicle emission controls).

[42] *E.g.*, Clean Air Act § 210, 42 U.S.C. § 1857f-6b (1970) (grants for developing and maintaining inspection and control programs).

> I think we should also pause to record that this bill also marks a very significant step forward in the continuing development of more responsive and responsible relationships among the Federal Government and the State and local governments of our country . . . . Would the Senator from Maine agree that this bill has very broad significance in the area of Federal-State relations?

Senator Muskie's reply was imprecise:

> Yes. May I say to the Senator that during the deliberations on this bill I have been very much interested in preserving "local option" features . . . . In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution.

116 Cong. Rec. 42386 (1970).

Another example of this ambiguity is the following excerpt pertaining to section 113 taken from the Senate Report:

> If the Secretary should find a State or local control agency not acting to abate violations of implementation plans or to enforce certification requirements, he would be expected to use the full force of Federal law. Also, the Secretary should apply the penalty provisions of this section to the maximum extent necessary to underwrite the strong public demand for abatement of air pollution and to enforce compliance with the provisions of the Act.
>
> If the Secretary and State and local agencies should fail their responsibility, the public would be guaranteed the right to seek vigorous enforcement action under citizen suit provisions of section 304 [42 U.S.C. § 1857h-2 (1970)].

S. REP. No. 91-1196, 91st Cong., 2d Sess. 20 (1970). While it is possible to read this as the Administrator insists we should, it is far more natural and reasonable to read it as indicating that the Administrator had ample power to enforce an implementation plan when a state has failed to do so.

Supporting this view of the Act is the following comment appearing in the House Report with respect to the House version of what became section 113 of the Act:

> Whenever the Secretary finds that as a result of the failure of a state to enforce the plan applicable to such State, any ambient air quality standard is not met, the Secretary is directed to notify the affected State or States, persons not in compliance with the plan and other interested parties. If the failure of the State to take action extends beyond the 30 days after the Secretary's notification, the Secretary may request the Attorney General to bring suit on behalf of the United States in the appropriate U. S. district court to secure abatement of the pollution.

H. R. REP. No. 91-1146, 91st Cong., 2d Sess. 8 (1970).

While the House version was significantly different from section 113 as enacted, it is by no means clear that section 113 intended to lump ineffectively-enforcing states with polluters and subject each of them to the same far-ranging set of remedies provided by

that section. To so intend indicates an insensitivity to the delicacy of federal-state relations which neither is reflected in other portions of the Act nor is worthy of Congress.

This recital of inconclusive bits of legislative history could be continued; however, we limit it to a few additional examples set forth in the margin.[43]

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[43] Congressman Springer, during presentation of the House Report, said,

> The bill provides . . . that State governments will create plans for the implementation and enforcement of the air standards. In fact a State may declare more stringent standards if it feels necessary. . . . [But i]f a State hangs back and fails to move out, the Federal Government will take over and make rules and regulations amounting to a State plan. Machinery for forcing a plan upon a State is spelled out including penalties of $10,000 a day for failing to act.

116 Cong. Rec. 19206 (1970).

Congressman Vanik, during the same debate, said,

> Further, if a State fails to enforce its plan, the Secretary of Health, Education, and Welfare can notify the State and persons who violate the plan. If, after such notice, the State fails to act within 30 days, the Secretary . . . may request the Attorney General of the United States to bring suit to secure abatement and cessation of the pollution. A court may then assess a fine of up to $10,000 a day for each day during which the polluter fails to take corrective action.

116 Cong. Rec. 19218 (1970).

The Senate Committee on Public Works reported:

> If the Secretary should find that a State or local pollution control agency is not acting to abate violations of implementation plans or to enforce certification requirements,

> he would be expected to use the full force of Federal law. Also, the Secretary should apply the penalty provisions of this section to the maximum extent necessary to underwrite the strong public demand for abatement of air pollution and to enforce compliance with the provisions of this Act.

S. REP. No. 91-1196, 91st Cong., 2d Sess. 20 (1970).

But Senator Muskie, the floor manager of the Senate bill, inserted this summary of provisions into the record:

> Federal enforcement under section 113 leaves the primary responsibility with the States for enforcing requirements under implementation plans. The administrator can issue an abatement order to a polluter or go to court seeking an injunction only after 30 days' notice to an individual polluter, or 30 days after notifying the State that the Federal Government is generally assuming enforcement powers in that State because of a widespread failure of State's enforcement. This gives States 30 days in which to take appropriate action themselves.

116 Cong. Rec. 42385 (1970).

The Senate Report, on the other hand, said this:

> The new section [section 116, State retention of authority] prohibits and provides for the enforcement of any violation by any person, as the term is defined in section 302 of the Act, of any applicable implementation plan, including any emission requirements forming a part of the plan, or any emission standard or standard of performance, or procedural requirement established under the Act.

S. REP. No. 91-1196, 91st Cong., 2d Sess. 57 (1970).

Finally, the House Committee on Interstate and Foreign Commerce reported:

> If at any time the Secretary determines that any person is violating the emission standards or that the State or interstate agency is failing to carry out such plan, the Secretary is directed to notify the agencies as well as the violator and specify the time within which such viola-

Enough has been said to demonstrate why we do not feel compelled by the language of the Act to reach the serious constitutional issues which the Administrator's interpretation raises. Validation of our interpretation, however, requires that we set forth these issues and, by suggesting our evaluation of them, reveal the intensity of our desire to avoid confronting them. To this task we now turn.

III.

Constitutional Issues

The Administrator contends that his interpretation encounters no constitutional barriers. Planting himself on Chief Justice Marshall's expansive definition of the power of Congress to regulate commerce set forth in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), he then points to that Chief Justice's classic statement of the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of

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tion must cease. If the violation does not cease within such time, the Secretary may request the Attorney General to bring suit on behalf of the United States in the appropriate U. S. district court to secure abatement of the pollution. The court may enter such judgment as the public interest and the equities of the case may require. Also, the court may assess a penalty of up to $10,000 for each day of violation after the time specified by the Secretary for the cessation of the violation. In determining the amount of such penalty, the court is directed to take into account the efforts of the defendant to abate the pollution involved.

H. REP. No. 91-1146, 91st Cong., 2d Sess. 9-10 (1970).

the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). On these foundations, the Administrator correctly asserts, were built the decisions in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), in which activities, otherwise local in scope and character, which exert a "substantial effect on interstate commerce" were held subject to regulation under the Commerce Power.

The emission of air pollutants without regard to their source, the Administrator asserts, has been found by Congress to exert the requisite effect on interstate commerce. This finding, moreover, cannot be said to be without a "rational basis." Having the power to regulate air pollution, the Administrator continues, Congress, under the Necessary and Proper Clause, has the power to direct that state officials either incorporate in the law of their state or administer and enforce on behalf of the Federal Government those regulations designed to control air pollution which are properly promulgated by the Administrator. The end (abatement of air pollution) is legitimate; it (the power to regulate air emissions) is within the scope of the Constitution; and the means (state administration and enforcement) are appropriate, plainly adapted to the end, which is not pro-

hibited, and consistent with the letter and spirit of the Constitution.

States by reason of their position under the Constitution are not immune from federal regulation under the Commerce Power, continues the Administrator. This has been established, he points out, by *United States* v. *California*, 297 U.S. 175 (1936), *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), *Fry* v. *United States*, —— U.S. —— (1975). It was put in *Maryland* v. *Wirtz*, *supra*, as follows:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of Commerce because a state is involved. If a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons the state too may be forced to conform its activities to federal regulation.

392 U.S. at 196, 197. This regulation includes the power to direct that a state either enact such laws to control air pollution as the Administrator might require, or administer and enforce such regulations as the Administration might properly promulgate. The state, as a builder of roads, maker of traffic laws, licensor of vehicles, is no more immune from this form of coercion, says the Administrator, than is a state-owned railroad exempt from the duty to comply with Federal safety regulations.[44] *See United States* v. *California*, 297 U.S. 175 (1936).

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[44] For an exposition of this view by the Administrator, *see* 38 Fed. Reg. 30632-33 (1973).

The petitioners sharply challenge this reading of the Commerce Power. Their fundamental contention is that the Commerce Power does not extend to requiring a state to undertake such *governmental* tasks as might be assigned to it by Congress, or its proper delegate, with respect to activities which admittedly are within the reach of the Commerce Power. The Constitution's Tenth Amendment and Article IV, Section 4, which obligates the United States to guarantee to every state a Republican Form of Government, precludes such an extension of the Commerce Power, assert the petitioners. Moreover, insofar as the Necessary and Proper Clause is concerned, the petitioners contend that the means, compulsory state administration and enforcement, is inappropriate and inconsistent with the letter and spirit of the Constitution.

We do not view these contentions as frivolous. Moreover, we are certain that neither *Maryland* v. *Wirtz* nor *Fry* v. *United States* passed upon the precise issues raised by the petitioners. These cases establish that the payment of wages by states to certain types of state employees is an economic activity that substantially affects interstate commerce and is thus subject to those regulations imposed by Congress which were then before the Court. Neither of these cases holds or even suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or "species of commercial intercourse" subject to regulation by Congress. *See Gib-*

bons v. *Ogden*, 72 U.S. (9 Wheat.) 1, 193 (1824). Nor do we believe that it is proper to equate the operation by a state of a railroad, an *economic activity* indistinguishable from that of private parties, with its *governance* of the use of highways and automobiles, an exercise of its police power with respect to commerce.[45]

The *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce*

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[45] We recognize that our views both with regard to the interpretation of the Clean Air Act and the constitutional issues here discussed differ from those expressed in Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3d Cir. 1974). With regard to the latter issues, we believe with all deference that the Third Circuit failed to recognize the difference between a state engaging in commerce, as all states must under the Supreme Court's interpretation of the Commerce Power, and a state's regulation of the commerce of others. This failure is reflected in the following passage, at 261:

> This reasoning indicates that the basis for the Court's decision in Maryland v. Wirtz, *supra*, is the principle that the constitutionality of federal regulation of state activities is subject to the same analyses as that of private activities; *viz.* the determinative factor is simply whether they have an impact on interstate commerce. Following this principle, we believe that the Administrator acted within the federal commerce power in requiring the Commonwealth to enforce its transportation plan.

The conclusion is a non sequitur. The principle deduced from *Maryland* v. *Wirtz* far exceeds its holding in our respectful opinion. We cannot believe that a careful craftsman like Mr. Justice Harlan intended in *Maryland* v. *Wirtz* to announce a principle so clearly inconsistent with the history of our federal structure.

Clause. Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the states is commerce. This distinction between commerce and governmental power to regulate commerce, we suggest, was recognized by Mr. Chief Justice Hughes when he observed, "The subject of federal power is 'commerce' and not all commerce but commerce with foreign nations and among the several states." *Santa Cruz Co.* v. *Labor Board*, 303 U.S. 453, 466 (1937). We also believe that Mr. Justice Harlan recognized this distinction in *Maryland* v. *Wirtz*, *supra* at 196, when he quoted Mr. Chief Justice Hughes' observation to demonstrate that the Commerce Power would not disable the Court from preventing "the utter destruction of the State as a sovereign political entity."

To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit. While such an interpretation might not enable Congress to direct the enactment or enforcement of a federal probate code, there

is sufficient doubt about even that to illumine the breadth of the sweeping claim here being made by the Administrator. To make *governance* indistinguishable from *commerce* for the purposes of the Commerce Power cannot be equated to the "unintrusive" regulation of economic activities of the states upheld by the Supreme Court in *Maryland* v. *Wirtz* and *Fry* v. *United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress. We will not attribute to Congress any such intent unless it is expressly unequivocally. As we have already pointed out, that was not done in the Clean Air Act.

To emphasize our reluctance to embrace the Administrator's interpretation, we wish to underscore that he is not merely insisting that the state's exercise of its police power must not improperly burden interstate commerce. *See Pike* v. *Bruce Church*, 397 U.S. 137 (1970); *Bibb* v. *Navajo Freight Lines Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). With this proposition no one differs. Nor is the Administrator merely insisting that in the area of control of air pollution federal law has preempted state law. *See, e.g., Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). The petitioners do not question the right of Congress to exclude states from participating in regulating interstate commerce.

Neither of these doctrines, if applied in a conventional manner, supports the Administrator's position. To provide such support, they must be distorted almost beyond recognition. Preemption must be invoked to eliminate a free exercise of state power, and the doctrine of unconstitutional burdens must be read to proscribe all state activities, *including abandonment to the Federal Government of all regulatory responsibility*, other than obedience to the Administrator's will. We are aware of no such version of these doctrines.

We hasten to point out that our reluctance to accept the Administrator's interpretation of the Act is not an effort at this late date to ignore Chief Justice Marshall's triumph over Mr. Jefferson with regard to the power of the Federal government *vis-a-vis* the states. Our concern, as we believe was Chief Justice Marshall's, is to preserve and protect a strong government of the United States and viable governments of the states. As we see it, our interpretation of the Act is more compatible with these objectives than that of the Administrator.

Our interpretation, moreover, does not deprive the Administrator of power to regulate air pollution in the manner provided by the Act. We merely hold that under the Act a state may decline, without becoming liable to sanctions, to undertake a program of control suggested by the Administrator; a state, however, may not interfere with such regulation of the sources of pollution as the Administrator pursuant to the Act undertakes. Our interpretation is

in no way inconsistent with the recognition that Congress has the power to authorize the Administrator to obtain the consent of a reluctant state by conditioning certain federal expenditures within that state on the granting of such consent. *See Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Nor should our constitutional concerns be interpreted as disfavoring a determination by Congress that the states may regulate certain aspects of commerce which have an effect on interstate commerce only in certain specified ways *if a state chooses to regulate that aspect of commerce at all.* We are, however, adopting an interpretation which makes it unnecessary for us to face the issue of whether Congress can prevent a state's withdrawal from the field.

Confrontation with this issue would require us to consider the effect such a power would have on the structure of the United States. Its existence, we suspect, would enable Congress to control ever increasing portions of the states' budgets. The pattern of expenditures by states would increasingly become a Congressional responsibility. The maintenance of tax revenues at the state level would be deterred by the realization of the people of each state that their control of the expenditures of such revenues increasingly was passing from their hands. Their likely responses would be, first, to demand increased federal subventions, whether in the form of revenue-sharing or otherwise, and second, to earmark state tax receipts for purposes over which the state has complete control. Neither response is consistent with either healthy federalism or sound public finance.

This severance of spending from taxing at the state level in our view does suggest that the petitioners are not irresponsible when they strongly suggest that the Republican Form of Government of the states would be seriously impaired. The power of each voter of each state over state expenditures, to the extent not supplied by the Federal government, would be less than his power over state taxation. Voters of other states, acting through their representatives in Congress would dilute the strength of the voters of the states whose revenues would be spent as Congress directs. A structure in which all power on the part of states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government. Nor could such an assertion be made were all taxation and expenditure responsibility to reside in the Federal Government. The limited severance of spending from taxing which the Administrator's interpretation of the Act and the Constitution would permit, therefore, should not be viewed as unrelated to the Guarantee Clause.

We do not consider our hesitancy to embrace the Administrator's interpretation as being in any way inconsistent with the obligation of the state courts, recognized by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), to enforce and recognize the supremacy of valid federal law as

interpreted by the Supreme Court. As Mr. Justice Story points out, this obligation was understood by Founding Fathers and is imbedded in the Constitution. No such plain command exists in the Constitution to support the Administrator's reading of the Commerce Power. Our constitutional practice has been quite contrary to his reading. In this regard, we find particularly revealing the following words of the late Professor Henry M. Hart, Jr., written as recently as 1954:

> Federal law often says to the states, "Don't do any of these things," leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, "Do *this* thing," leaving no choice but to go ahead and do it. The *Federalist* papers bear ample witness to the Framers' awareness of the delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the governments of the member states.
>
> The Constitution counts upon the necessary participation of the states in the electoral process not by direct command but by the incentive of not losing the opportunity of participation. In similar fashion Congress now elicits desired affirmative performances from the states by attaching them as conditions to the receipt of federal grants-in-aid. If we search the Constitution for provisions which have the appearance of affirmative requirements, two of the most striking are those which call for the surrender of fugitive slaves and fugitives from jus-

> tice. But the first was disembowelled by the *tour de force* of *Prigg* v. *Pennsylvania*, and the second was flatly held, in *Kentucky* v. *Denison*, to be judicially unenforceable. "And we think it clear," said Chief Justice Taney in the latter case, "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Taney's statement can stand today, if we except from it certain primary duties of state judges and occasional remedial duties of other state officers. Both exceptions, it will be observed, involve enforcement through the orderly and ameliorating forms of the judicial process. In any event, experience with the exceptions does little to bring into question the principle of the rule.
>
> The judges of the state courts are not only sworn to support the Constitution, like other state officers, but are bound also to observance of federal law by the special direction of the supremacy clause. This may on occasion require them, specifically and affirmatively, to enter a particular judgment, as in complying, for example, with the injunction of the full faith and credit clause. State courts ordinarily fulfil such obligations without question. But Congress nevertheless has recognized the possibility of conflict and authorized the Supreme Court, in its discretion, to avoid it by entering judgment itself. The imbroglio of *Martin* v. *Hunter's Lessee* suggests the wisdom of making this alternative available.
>
> Judicial mandates to non-judicial state officers to enforce either primary or remedial duties re-

> quiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment. Whether a writ of mandamus to compel performance of a ministerial duty would be regarded as an action against the state is not altogether clear. But it is significant that a practice of issuing such writs to state officers has never become established.

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. R. 515-16 (1954) (footnotes omitted).

Finally, we are encouraged by the Supreme Court's footnote 7 in *Fry* v. *United States*. In describing the Tenth Amendment, it was said in the footnote:

> The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

—— U.S. at —— n.7. Moreover, the Supreme Court in *Maryland* v. *Wirtz* observed:

> The Court has ample power to prevent what the appellants purport to fear, "the utter destruction of the State as a sovereign political entity."

392 U.S. at 196.

It is our task, where possible, to avoid a statutory interpretation which would require us to decide whether the extensive control of state expenditures, which the Administrator's view would permit, does

either threaten "the utter destruction of the State as a sovereign political entity," or "impair the States' integrity or their ability to function effectively in a federal system." As we have made abundantly clear, we are sufficiently apprehensive about the ability of states "to function effectively in a federal system" under the Administrator's interpretation to justify our strong preference for an interpretation that puts our concerns at rest. In addition, we reject as a means of allaying our fears the assumption that the prospect of "utter destruction of the State as a sovereign political entity" is confronted only when Congress asserts the power to regulate *all* aspects of state and local government. Only the mischievous would contend that not until then is the issue ripe.

All efforts by the Administrator to impose sanctions on the State of California are stayed to the extent indicated in this opinion. To that extent the petitions for review are granted.

Pursuant to Rule 54(b), FED. R. CIV. P., to the extent that there remain unresolved claims presented by the petitioners, the disposition of the issues set forth herein shall be treated as a final judgment with respect to fewer than all the claims presented by the petitioners and we expressly determine that there is no just reason for delay in entering such final judgment wtih respect to the claims of which this opinion disposes.

PETITIONS FOR REVIEW GRANTED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-3306, 73-3305, 73-3307

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY & COLLEGES, ETC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

CALIFORNIA AIR RESOURCES BOARD, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

JUDGMENT

A petition for review from the United States Environmental Protection Agency.

This cause came on to be heard on the transcript of the record of the United States Environmental Protection Agency and was duly submitted. On consideration whereof IT IS NOW HERE ORDERED AND ADJUDGED by this Court that, pursuant to Rule 54(b), Federal Rules of Civil Procedure, to the extent that there remain unresolved claims presented by the petitioners the disposition of the issues set forth herein shall be treated as a final judgment with respect to fewer than all the claims presented by the petitioners and we expressly determine that there is no just reason for delay in entering such final judgment with respect to the claims of which this opinion disposes.

Petitions for review granted in part.

Filed and entered August 15, 1975.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3577

STATE OF ARIZONA, ET AL., PETITIONERS,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 73-3588

BROADWAY-HALE STORES, INC., ET AL., PETITIONERS,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 74-1001

PROPER ENVIRONMENTAL PLANNING, INC.,
PETITIONER,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 74-1002

SEARS, ROEBUCK AND COMPANY, PETITIONER,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 74-1009

SAFEWAY STORES, INC., PETITIONER,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

No. 74-1013

HOMART DEVELOPMENT CO., PETITIONER,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

OPINION

[September 8, 1975]

On Petition for Review of Orders and Regulations
of the Environmental Protection Agency

Before: ELY, TRASK and SNEED, Circuit Judges.

SNEED, Circuit Jud e:

The Environmental Protection Agency has indefinitely suspended those portions of the Maintenance of National Standards regulation, 40 C.F.R. § 52.22 (1974), which cover parking-related facilities, and the Management of Parking Supply regulation 40 C.F.R. § 52.139 (1974), in its entirety. 40 Fed. Reg. 28064, 29713 (1975). Further, the EPA indicated in oral argument of *Brown* v. *Environmental Protection Agency*, —— F.2d ——- (9th Cir. 1975), that the latter suspension was equivalent to a revocation of the regulation. Therefore, for purposes of filing a new petition for review, lifting the suspension or amending the regulation would be the same as a promulgation of the regulation anew. A statement to similar effect is incorporated by reference in the Supplemental Submission filed by EPA in these cases on July 21, 1975. Under such circumstances, new petitions for review may be filed within 30 days of such promulgation, pursuant to section 307 of the Clean Air Act, 42 U.S.C.A. § 1857h-5 (West Supp. 1975).

In view of these developments, the Court finds that so much of the petitioners' dispute with the EPA as pertained to the Management of Parking Supply regulation, *supra*, or those portions of the Maintenance of National Standards regulation, *supra*, which cover parking-related facilities, is moot, and that any future dispute is not before us. *Thorpe* v. *Housing*

Authority, 393 U.S. 268, 281-84 (1969); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 239-41 (1937); *Vulcanized Rubber & Plastics Co. v. Federal Trade Comm'n*, 258 F.2d 684 (D.C. Cir. 1958). Accordingly, so much of the petitions of the parties listed above as is concerned with the regulations herein referenced is dismissed without prejudice to the petitioners should the Administrator lift his suspension of 40 C.F.R. § 52.22 or § 52.139 (1974) or promulgate new regulations pertaining to the same general subject matter.

The petition of the State of Arizona also raises issues we dealt with in *Brown* v. *Environmental Protection Agency*, *supra*. We dispose of that portion of the petition as is directed to these issues in the same manner as was done in that case. That is, we hold that the Clean Air Act does not authorize the imposition of sanctions against the State of Arizona or its officials for failure to comply with the directives set forth in 40 C.F.R. §§ 52.22, 52.129, 52.132, 52.133, 52.137, 52.138 and 52.140 (1974). The basis for our decision is the same in all respects as in *Brown* v. *Environmental Protection Agency*, *supra*. Therefore, there exists no reason to repeat them here.

In view of these actions, each of the above-listed parties is directed to inform this Court not later than 21 days following the date of this decision which, if any, of the other issues set forth in their petitions for review they continue to desire this Court

to review. Pursuant to Rule 54(b), FED. R. CIV. P., to the extent that there remain unresolved claims presented by the petitioners, the disposition of the issues set forth herein shall be treated as a final judgment with respect to fewer than all the claims presented by the petitioners and we expressly determine that there is no just reason for delay in entering such final judgment with respect to the claims of which this opinion disposes.

GRANTED IN PART AND DISMISSED WITHOUT PREJUDICE IN PART.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-3577, 73-3588, 74-1001, 74-1002,
74-1009 and 74-1013

STATE OF ARIZONA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

BROADWAY-HALE STORES, INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

PROPER ENVIRONMENT PLANNING, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SEARS, ROEBUCK AND COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SAFEWAY STORES, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

HOMART DEVELOPMENT CO., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

JUDGMENT

A petition for review from the United States Environmental Protection Agency.

This cause came on to be heard on the transcript of the record of the United States Environmental Protection Agency and was duly submitted. On consideration whereof IT IS NOW HERE ORDERED AND ADJUDGED by this Court that, pursuant to Rule 54(b), Federal Rules of Civil Procedure, to the extent that there remain unresolved claims presented by the petitioners the disposition of the issues set forth herein shall be treated as a final judgment with respect to fewer than all the claims presented by the petitioners and we expressly determine that there is no just reason for delay in entering such final judgment with respect to the claim of which this opinion disposes.

Petitions granted in part and dismissed without prejudice in part.

Filed and entered September 8, 1975.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. Sections 101, 107, 109, 110, 113 and 302(e) of the Clean Air Act of 1967, 81 Stat. 485, as amended

by the Clean Air Act Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*, as amended by Section 302, 85 Stat. 464 and Section 4 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256, provide in relevant part:

Section 101 (42 U.S.C. 1857)

Congressional findings; purposes of subchapter.

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public

health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Section 107 (42 U.S.C. 1857c-2)

Air quality control regions.

(a) Responsibility of State for air quality; submission of implementation plan.

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * * *

Section 109 (42 U.S.C. 1857c-4)

National primary and secondary ambient air quality standards; promulgation; procedure.

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard

and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this sec-

tion shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Section 110 (42 U.S.C. 1857c-5)

State implementation plans for national primary and secondary ambient air quality standards.

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan

implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as

may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the re-

vision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare

and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than

three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend

until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term 'parking surcharge regulation' means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term 'preferential bus/carpool lane' shall include any requirement for the setting aside of one or more lanes of a street or highway on a

permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement

such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision

complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D), of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307 (a) (relating to subpenas) shall be applicable to any proceeding under this subsection.

* * * * *

Section 113 (42 U.S.C. 1857c-8)

Federal enforcement procedures.

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or

he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), or 119 (g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or re-

quirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of

a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of viola-

tion, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

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Section 302 (42 U.S.C. 1857h)

Definitions.

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * * * *

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

* * * * *

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

III. 40 C.F.R. Part 52 provides in pertinent part:

§ 52.23 (as amended Sept. 18, 1974, 39 Fed. Reg. 33512)

Violation and Enforcement.

Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required

to contain, or if the person or Governmental entity fails to comply with such schedule.

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Subpart F—California

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§ 52.242 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program to reduce emissions from in-use vehicles through identifying vehicles which need emission control-related maintenance and requiring that maintenance be performed.

(2) "Light-duty vehicle" means any gasoline-powered motor vehicle rated at 6,000 pounds GVW or less.

(3) All other terms used in this section that are defined in Appendix N to Part 51 of this chapter, are used herein with the meanings so defined.

(b) This section is applicable in the Metropolitan Los Angeles, San Diego, Sacramento Valley, San Joaquin Valley, and San Francisco Bay Area Intrastate Air Quality Control Regions (hereinafter referred to as the Regions).

(c) The State of California shall establish an inspection and maintenance program applicable to all light-duty vehicles registered in the Regions that operate on streets or highways over which it has ownership or control. No later than June 1, 1974, the State shall submit legally adopted regulations to EPA establishing such a program. The State may exempt any class or category of vehicles which it finds are rarely

used on public streets and highways (such as classic or antique vehicles). The regulations shall include:

(1) Provisions for inspection of all light-duty motor vehicles at periodic intervals no more than one year apart by means of a loaded test.

(2) Provisions for inspection failure criteria consistent with the emission reductions claimed in the plan for the strategy. These emission reductions are 15 percent for hydrocarbons and 12 percent for carbon monoxide. These criteria are estimated to include failure of 50 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks, the maintenance necessary to achieve compliance with the inspection standards. This shall include sanctions against noncomplying individual owners and repair facilities, retest of failed vehicles following maintenance, a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowedgeable operators to perform the tasks satisfactorily, and such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that, following inspection or maintenance, vehicles are not intentionally readjusted or modified in such a way as would cause them no longer to comply with the inspection standards. This might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspec-

tion cycle on October 1, 1975, and completing it by September 30, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After September 30, 1976, the State shall not register or allow to operate on its streets or highways and light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After September 30, 1976, no owner of a light-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new vehicle.

(f) The State of California shall submit no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including the text of needed statutory proposals and needed regulations that it will propose for adoption. The compliance schedule shall also include:

(1) The date by which the State will recommend any needed legislation to the State legislature.

(2) The date by which necessary equipment will be ordered.

(3) A signed statement from the Governor and State Treasurer identifying the sources and amount of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

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